

Operational aspects of the National Payment System Act 78 of 1998

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OPSOMMING

Operasionele aspekte van die Nasionale Betalingstelselwet 78 van 1998

Hierdie artikel handel oor die Nasionale Betalingstelselwet van 1998. Dit verduidelik hoe betalings tussen banke en ander finansiële instellings asook aan derde partye gemaak word. Dit bespreek ook die rol wat die Reserwebank speel by die betalingstelsels en hoe die bank oorsig hou oor die stelsels. Die rol wat die insolvensie van een van die deelnemers aan die betalingstelsel speel word ook onder die loep geneem.

1 INTRODUCTION

In the last two years, four important decisions of the Constitutional Court were delivered, all dealing with different aspects of the distribution of social service grants to beneficiaries on behalf of the South African Social Security Agency (SASSA). The grants were, and still are, distributed by Cash Paymaster Services (Pty) Ltd (CPS), a subsidiary of Net1/Applitec, a company listed on NASDAQ and on the JSE Securities Exchange. In the first case, the court set aside a tender for the provision of social grants to approximately 15 million beneficiaries.¹ In the second case, the court declared the contract between SASSA and CPS invalid and ordered that the tender process be re-run.² The declaration of invalidity was suspended to enable SASSA to repeat the process and to decide whether to award the tender. The court made a structured order to provide for report backs at various stages of the tender process. The third case led to an order that was largely agreed upon by all the parties except for one contested paragraph on which the court delivered judgment holding that it retained supervisory jurisdiction

¹ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 SA 604 (CC).

² *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 4 SA 179 (CC).

in the process.³ In the fourth matter,⁴ a party was granted direct access to the court, another given leave to intervene and others admitted as *amici curiae*. It was declared that SASSA and CPS were under a constitutional obligation to ensure payment of social grants until an entity other than CPS is able to do so and that a failure would amount to an infringement of the beneficiaries' right to social assistance in terms of section 27(1)(c) of the Constitution of 1996. Notwithstanding the invalidity of the contract with CPS, the declaration of invalidity was suspended for a further 12 months and SASSA and CPS were directed to ensure payment of the social grants from 1 April 2017 after expiry of the contract on 31 March 2017 but on the same terms (subject to certain conditions). Certain ancillary orders were also made.

This article is not concerned with the considerable constitutional dimensions of these judgments but with the provisions of the National Payment System Act (NPSA) which provides, *inter alia*, for the appointment and conditions of appointment of payment service providers, such as CPS, to make payments to creditors. The growing involvement of non-banks in the payment and clearing system will lead to new regulatory challenges. The National Payment System Department has given careful consideration to allowing non-banks entry into the national payment system provided they meet the necessary entry requirements, and "being mindful to ensure that a level playing field is maintained".⁵ The future may see the increased development of new payment system participants such as "payment system providers" (which are not banks) and "domestic money remitters" (entities other than banks).⁶

2 ROLE OF THE RESERVE BANK

The Reserve Bank may, in terms of section 10(c) of the Reserve Bank Act,⁷ "perform such functions, implement such rules and procedures and, in general take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems". In 1995, the *South African national payment system framework and strategy document* was published, which is referred to as the "*Blue book*" or as "*Vision 2004*",⁸ and has been confirmed and expanded on in later documents.⁹ The achievements referred to in

³ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2015] ZACC 7.

⁴ *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* (CCT48/17) [2017] ZACC 8 (17 March 2017).

⁵ South African Reserve Bank *National Payment System Department. Oversight framework* (October 2016) para 4.1.92.

⁶ *Idem* para 5.8.

⁷ 90 of 1989.

⁸ See South African Reserve Bank *The national payment system framework and strategy: Vision 2010* (2006) para 1. For a detailed discussion, see Lawack-Davids "The legal and regulatory framework of the National Payment System (NPS) – Peeling the layers of the onion" 2008 *Obiter* 453 and "The trade-off between financial inclusion and financial integrity in the National Payment System" in Visser and Pretorius (eds) *Essays in honour of Frans Malan* (2014) 219. See further Geva "Reform of the regulation and governance of the Canadian payment system" 2015 *ABLU* 145 with an "Addendum: Payment system regulation and governance in South Africa" 176.

⁹ *National Payment System framework and strategy: Vision 2010 (Vision 2010); National Payment System framework and strategy: Vision 2015 (Vision 2015)* and South African
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this remarkable document include the introduction of the South African Multiple Option Settlement system (SAMOS) which provides for the real-time gross inter-bank settlement system enabling banks to choose several settlement options, including liquidity-optimising functions.¹⁰ The SAMOS system provides for the settlement of individual high-value transactions, batched retail obligations and bond and equity market obligations enabling delivery against payment. An umbrella body to manage the conduct of participants in the payment system was established on 26 September 1996, namely, the Payments Association of South Africa (PASA).¹¹

The NPSA came into effect in October 1998. From 1999, several measures were taken to reduce the risk in the retail payment environment. They include the introduction of the Payment Clearing House Agreements,¹² item limits, intra-day monitoring of liquidity usage, directives and the introduction of the same-day settlement and same-day square-off. On the international level, in December 2004, the Rand was accepted as a continuous linked settlement currency aimed at the reduction of foreign exchange settlement risk.

The NPSA provides for the management, administration, operation, regulation and supervision of the payment, clearing and settlement systems in South Africa. It was inspired by legislation in Belgium¹³ and Canada.¹⁴ A major concern leading

Reserve Bank *National Payment System Department. Oversight framework* (October 2016).

- 10 Steennot *Elektronisch betalingsverkeer: Een toepassing van klassieke principes* (2002) 199 describes it as implying “dat betalingen op een continue basis individueel en onmiddellijk worden verwerkt. Betalingen tussen financiële instellingen onderling geschieden door middel van het crediteren en het debiteren van de rekeningen die de financiële instellingen bij de central bank, bij een derde financiële instelling of bij elkaar aanhouden. Eens een betaling ingeschreven is op het credit van de betrokken rekening is de betaling op het interbancair niveau definitief voltrokken. De betaling voltrekt zich derhalve in de boeken van de (central) bank”.
- 11 South African Reserve Bank *The national payment system in South Africa 1995 to 2005* para 3.5.
- 12 Of importance are the following: the Card Agreements, the Mentorship Agreement, the Payment Clearing House Agreements (for Paper Credit Instructions, Electronic Code Line Clearing Debit Payment Instructions, Credit Payment Instructions for Immediate Settlement, EFT Debit Payment Instructions), the different Service Agreements, the Settlement Agreements, the Sponsorship Agreements and the Settlement Agreement. Also relevant is the Payment Clearing House Rules for Paper Based Payment Instructions.
- 13 Law on the Legal Status and Supervision of Credit Institutions (Belgian *Official Gazette* 76 of 19 April 1993).
- 14 Payment, Clearing and Settlement Act passed by the House of Commons on 23 April 1996. See the comprehensive discussion by Geva “The domestic payment system: Policies, structure, operation and risk” in Norton and Andenas (eds) *Emerging financial markets and the role of international financial organizations* (1996) 115. Cf the Japanese Payment Services Act that was enacted in June 2009 which provides for the regulatory framework for issuers of prepaid payment instruments including electronic money, non-bank providers of transfer services and central counterparties for these transactions. For a discussion of the stored-value card and its popularity in Japan, see Luyat “A tale of regulation in the European Union and Japan: Does characterising the business of stored-value cards as a financial activity impact its development?” 2009 *Pacific Rim L & Policy J* 526 and, particularly, Sugiura “Electronic money and the law: Legal realities and future challenges” 2008.8.01 (No 1361) *Jurimoto 2009 Pacific Rim Law & Policy J* 511 (translated by Luyat).

to the enactment of legislation of this nature was the issue of “systemic risk” which the NPSA characterises as the

“risk that failure of one or more system participants, for whatever reason, to meet their payment obligations, including the payment obligations of clearing system participants, or their settlement obligations may result in any or all of the other settlement system participants being unable to meet their respective payment or settlement obligations”.¹⁵

The South African Reserve Bank is entrusted with the powers and duties conferred and imposed by the NPSA.¹⁶ It may designate a settlement system if it is in the interests of the integrity, effectiveness, efficiency or security of the payment system.¹⁷ In addition, the Reserve Bank may recognise a payment system management body established with the object of organising, managing and regulating the participation of members in the payment system.¹⁸ A “payment system” is a system that enables payments to be effected or that facilitates the circulation of money and includes any instruments and procedures that relate to the system.¹⁹ The recognition of the payment system management body by the Reserve Bank is dependent upon the latter being satisfied with certain conditions, namely,²⁰ that the body fairly represents the interests of its members; that the deed of establishment or constitution and the rules of the payment system management body, including those relating to the admission of members are fair, equitable and transparent; and that the Reserve Bank will be enabled to oversee the affairs of the payment system management body and its members adequately in the discharge of its responsibilities in terms of section 10(1)(c)(i) of the South African Reserve Bank Act regarding the monitoring, regulation and supervision of payment, clearing and settlement systems. Only the Reserve Bank, banks, mutual banks, co-operative banks, branches of foreign institutions and a designated clearing system participant may be members of it.²¹ No person may participate in the Reserve Bank settlement system other than the institutions referred to above, or a designated settlement systems operator or a person meeting certain

15 S 1 of the NPSA *sv* “systemic risk”. Specific powers are given to the Reserve Bank to curb this risk when reasonable grounds exist to believe that a person is engaging in or is about to engage in any activity, omission or course of conduct that results in or is likely to result in systemic risk (s 12(2)(a) of the NPSA).

16 S 10 allows the Reserve Bank access to information relevant to its functions under the NPSA. S 11 regulates the settlement of disputes between settlement system participants and the Reserve Bank. S 13(1) requires the Reserve Bank, Reserve Bank settlement system participants, clearing and system participants, PCH system operators and system operators to retain their records relating to the settlement system for a period of five years. Fortunately, s 13(3) allows the retention of these records by the means envisaged by the Electronic Communications and Transactions Act, 2002. See, generally, Volker *Essential guide to payments. An overview of the services, regulation and inner workings of the South African National Payment System* (2013) 263ff.

17 S 4A(1) of the NPSA.

18 Under s 3(1) of the NPSA, the Continuous Linked System of the CLS Bank International was designated as the settlement system and CLS as the designated systems operator. The designation enables the CLS to have a settlement account with the Reserve Bank – a real-time gross settlement account in the South African Multiple Option Settlement (“SAMOS”) System (GN 2459 in GG 26953 of 31 October 2004).

19 S 1 of the NPSA *sv* “payment system”.

20 S 3(2).

21 S 3(3).

criteria.²² Nor may any person “clear” payment instructions unless he is a Reserve Bank settlement system participant or a bank, a mutual bank, a designated clearing system participant, a co-operative bank or branch of a foreign institution allowed to clear in terms of section 4(2)(d)(i).²³ “Clear” means the exchange of payment instructions.²⁴

The NPSA also regulates payment intermediation by allowing a person to accept payment instructions (that is, instructions “to transfer funds or make a payment”)²⁵ as a regular feature of his business from any other person for the purpose of making payment on behalf of that person to a third party to whom that payment is due,²⁶ if that person is the Reserve Bank, a bank, mutual bank, a co-operative bank, a designated clearing system participant, branch of a foreign institution, or a designated settlement system operator; or a postal company as defined in section 1 of the Post Office Act, 1958 or the Postbank as defined in section 51 of the Postal Services Act, 1998; or the money is accepted or payment is made in accordance with directives made by the Reserve Bank in terms of section 12. In terms of a Directive, it is acknowledged that persons other than the traditional banks may also become involved in the payment process thereby adding value to the national payment system and its users.²⁷ The Directive concerns payments made to third persons in the following ways:²⁸

- “(a) Money or the proceeds of payment instructions are accepted by a person (a beneficiary service provider), as a regular feature of that person’s business, from multiple payers on behalf of a beneficiary. (A typical example being the

22 S 3(4).

23 S 6(1).

24 S 1 *sv* “clear”.

25 S 1.

26 S 7.

27 See *Directive for conduct within the National Payment System in respect of payments to third persons* (Directive 1 of 2007) GG 30261 of 6 September 2007 para 1.3.3. The recommendations of the Jali Report *Banking enquiry. Report to the Competition Commissioner by the enquiry panel. Executive overview* (June 2008; Thabani Jali executive chairperson) in this respect read: “[15] An access regime that includes non-bank providers of payment services should be developed so as to allow for their participation, under effective regulation and supervision, in both clearing and settlement activities in appropriate low-value or retail payment streams. There are international precedents – such as those from Australia and the European Union – that suggest that an access regime of this sort can be designed that does not threaten the systemic stability. [16] The National Payment System Act should be revised. This would allow for non-banks to be clearing and (even) settlement participants, and hence members of PASA. It would allow for different types of participants and membership of payment clearing houses. Once the NPS Act has been redrafted, the associated SARB and PASA position papers and directives would also have to be revised. Obvious examples are the Bank Models position paper, to accommodate the realities of Postbank and Ithala Limited and the e-money position paper, as well as the directives on system operators and third party providers. [17] The membership and governance of PASA should be revised so as to include qualified non-bank participants. PASA is the delegated self-regulatory authority of the payments system. This position, together with the professed view of the NPSD that their remit and that of PASA as the payment system management body extends throughout payment system activity, means that PASA membership should be extended to participating non-banks.” See *Vision* paras 1 and 2.3 2.9 and Lawack-Davids in *Essays* 226–227. For a discussion of the Australian situation, see Beatty, Aubrey and Bollen “E-payments and Australian regulation” 1998 *UNSWLJI* 43.

28 Para 1.3.4.

acceptance of money or proceeds of payment instructions by a retailer or other outlets for payment of utility bills); or

- (b) Money or the proceeds of payment instructions are accepted by a person (a payer service provider), as a regular feature of that person's business, from a payer to make payment on behalf of that payer to multiple beneficiaries. (A typical example being the payment of salaries on behalf of employers to employees.)"

3 BENEFICIARY AND PAYER SERVICE PROVIDERS

Following this description, a "beneficiary service provider" is defined²⁹ as a person "who accepts money or the proceeds of payment instructions, as a regular feature of that person's business, from multiple payers on behalf of a beneficiary". A "payer service provider" is a person³⁰ "who accepts money or the proceeds of payment instructions, as a regular feature of that person's business, from a payer to make payment on behalf of that payer to multiple beneficiaries". The term "payments to third person" entails the "activities of a beneficiary service provider and a payer service provider".³¹ Certain prudential requirements, but no capital requirements, are set for both beneficiary and payer service providers.³² A large proportion of payment services is provided by non-banks, the largest of which is Net1/Aplitec, a private company listed on the NASDAQ stock and the JSE Securities exchange. Net1 provides two major payment service products: bill payments and social welfare payments. The bill payments business of Net1 is handled by a subsidiary, EasyPay, which acts as an agent to handle bill payments for municipalities, utility companies, financial institutions (including banks and insurance companies), medical practitioners, and many others. Payments using EasyPay can be made at the outlets of South Africa's largest retailers, Pick 'n Pay and Shoprite Checkers, as well as other retail outlets. Customers pay retailers,

²⁹ Para 2.1.

³⁰ Para 2.2.

³¹ Para 2.3.

³² Para 3. These include that the service provider or the payer service provider be assured of its agency, that it keeps proper records and that it "keep[s] separate and distinct the business divisions of that person who provides payments to third persons from the business divisions of that person. WHO provides system operator services" (para 3.1.4). Further, para 3.1.5 provides that the service provider must ensure that "the services it provides, including the services that it uses, are safe and efficient so as not to introduce risk, including reputational risk, into the NPS. In this regard, persons who provide payments to third persons and who process payment instructions, including the delivery to and/or receipt of payment instructions from a bank and/or a PCH system operator on their own behalf, rather than using the services of an independent system operator, are required to meet the same level of compliance with operational and technical requirements as required in terms of sections 3.4.1 to 3.4.4 of the Criteria of System Operators". In addition, the payment service provider must inform its banker of its involvement in payments to third persons and the banker, in turn, must inform the payment management body accordingly (para 3.1.6). The *Directive for conduct within the National Payment System: In respect of system operators* (Directive 2 of 2007) are set out in GN 1111 of 6 September 2007 (GG 30261). For a discussion of whether prudential requirements should be set for these service providers, see Bollen "A discussion of best practice in the regulation of payment services" 2010 *J of Int Banking L and Regulation* 370 (Part 1) and 429 (Part 2) 433–434 and his *Best practice in the regulation of payment services* (DPhil thesis RMIT University 2010). EU Directive 2015/2366 contains a host of directives relating to payment service providers. We need not discuss them here.

retailers reconcile with EasyPay, and EasyPay reconciles with the utility or other intended recipient of the payment. EasyPay also facilitates Internet based payments, but this channel is currently accessible only to credit card holders. It also uses a smartcard system to make social welfare payments for its 3,8 million customers.³³ Net1 has avoided the prohibition on “deposit-taking”³⁴ by non-banks through an arrangement with government departments pursuant to which Net1 first makes the payment to recipients and then claims from the government.³⁵

33 The website of Net1 describes its social service payments thus: “Our CPS business unit deploys our U.E.P.S. – Social Grant Distribution technology to distribute social welfare grants on a monthly basis to over nine million beneficiaries in South Africa. These social welfare grants are distributed on behalf of SASSA. During our 2012, 2011 and 2010 fiscal years, we derived 41%, 47%, and 66% of our revenues respectively, from CPS’ social welfare grant distribution business. CPS provides a secure and affordable transacting channel between social welfare grant beneficiaries, SASSA and formal businesses. CPS enrolls social welfare grant beneficiaries by issuing them a U.E.P.S./EMV smart card that digitally stores their biometric fingerprint templates on the smart card, enabling them to access their social welfare grants securely at any time or place. The smart card is issued to the beneficiary on site and utilises optical fingerprint sensor technology to identify and verify a beneficiary. The beneficiary simply inserts a smart card into the POS device and is prompted to present his fingerprint. If the fingerprint matches the one stored on the smart card, the smart card is loaded with the value created for that particular smart card. Additionally, during enrolment we capture the beneficiary’s voice print to perform biometric verification when using channels such as ATMs and traditional POS terminals that normally do not have fingerprint readers. The smart card provides the holder with access to all of the U.E.P.S. functionality, which includes the ability to have the smart card funded with pension or welfare payments, make retail purchases, enjoy the convenience of pre-paid facilities and qualify for a range of affordable financial services, including insurance and short-term loans as well as standard EMV transactional capabilities to operate wherever MasterCard is accepted. The smart card also offers the card holder the ability to make debit order payments to a variety of third parties, including utility companies, schools and retail merchants, with which the holder maintains an account. The card holder can also use the same smart card as a savings account. Our U.E.P.S. – Social Grant Distribution technology provides numerous benefits to government agencies and beneficiaries. The system offers government a reliable service at a reasonable price. For beneficiaries, our smart card offers convenience, security, affordability, flexibility and accessibility. They can avoid long waiting lines at payment locations and do not have to get to payment locations on scheduled payment dates to receive cash. They do not lose money if they lose their smart cards, since a lost smart card is replaceable and the biometric fingerprint or voice identification technology helps prevent fraud. Their personal security risks are reduced since they do not have to safeguard their cash. Beneficiaries have access to affordable financial services, can save and earn interest on their smart cards and can perform money transfers to friends and relatives living in other provinces. Finally, beneficiaries pay no transaction fees when they use our infrastructure to load their smart cards, perform balance inquiries, make purchases or downloads, or effect monthly debit orders. For us, the system allows us to reduce our operating costs by reducing the amount of cash we have to transport. This business unit has been allocated to our South African transaction-based activities and smart card accounts reporting segments”, available at <http://bit.ly/2rtDfqa>.

34 See Malan and Faul “Introduction to the Deposit-taking Act 94 of 1990” 1991 *TSAR* 379.

35 The CGAP “Update on regulation of branchless banking in South Africa” (January 2010) para 2.5 on which this paragraph is based. Vodacom and Nedbank (a “bank”) launched the M-Pesa payment service in 2010. This is a cellphone-based money transfer system based on the Kenyan model (see Geach “The digital divide, financial exclusion and mobile phone technology: Two problems, one solution?” 2007 *J of Int Trade L and Policy* 21) which may eventually require regulation under the NPSA (see the discussion by Kim “Ubiquitous

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4 THE SETTLEMENT SYSTEM

A “settlement system” is a system for the discharge of payment or settlement obligations or the discharge of payment and settlement obligations between participants in that system.³⁶ A “settlement obligation” is an indebtedness owed by one settlement system participant to another as a result of one or more settlement instructions.³⁷ A “settlement instruction” is an instruction given to a settlement system or by a settlement system participant or by a PCH system operator on behalf of a Reserve Bank settlement system participant to effect settlement.³⁸ A “payment clearing house (PCH)” is “an arrangement between two or more clearing system participants and Reserve Bank settlement system participants, excluding a designated settlement system operator, governing the clearing or netting of payment instructions between those clearing system participants and Reserve Bank settlement system participants”.³⁹ Likewise, a “payment instruction” is an instruction to transfer funds or to make payment.⁴⁰ A “payment obligation” is “an indebtedness owed by one clearing system participant or settlement system participant to another clearing system participant or settlement system participant as a result of the clearing of one or more payment instructions”.⁴¹ The objects of a payment system management body are defined as consisting in the management and control of all matters affecting payment instructions and to regulate in relation to its members, all matters affecting payment instructions.⁴² In addition, the management body is to function as a forum for the consideration of policy matters and issues of mutual interest;⁴³ to act as a medium of communication for its members with the government, the registrars of banks and financial institutions, financial and other exchanges, public bodies and so forth;⁴⁴ to promote and deal with matters of interest to its members and

money and walking banks: Environment, technology, and competition in mobile banking” 2008 *Richmond J of Global L and Business* 37 80ff). On the Mzansi money transfer, see Volker 247ff. For a discussion of the NPSA and the problem of non-banking entities providing payments via mobile phones or devices, see Perlman *Legal and regulatory aspects of mobile financial services* (LLD thesis Unisa 2012) 520ff.

36 S 1 of the NPSA *sv* “settlement system”.

37 A “settlement system participant” is either a “Reserve Bank settlement system participant” or a “designated settlement system participant”. The former is the “Reserve Bank, a bank, a mutual bank, a co-operative bank or a branch of a foreign institution” or a “designated settlement system operator” that participates in the “Reserve Bank settlement system”. The “Reserve Bank settlement system” is “the system established and operated by, or under the control of, the Reserve Bank”. A “clearing system participant” is “a bank, mutual bank, a co-operative bank, a branch of a foreign institution or designated clearing system participant that clears as contemplated in section 4(2)(d)(i)”. A “system operator” is “a person authorised in terms of s 4(2)(c) to provide services to two or more persons in respect of payment instructions” (other than a designated settlement systems operator). A “designated systems operator” and a “PCH system operator” are defined in s 1. See s 1 of the NPSA for all the definitions of the various participants in the clearing systems.

38 S 1 of the NPSA.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 S 4(1).

43 S 4(1)(a).

44 S 4(1)(b).

foster co-operation between them.⁴⁵ The rules of the management body have to conform with the criteria set out in section 4(2). They relate to membership;⁴⁶ committees *et cetera*;⁴⁷ the criteria to recommend to the Reserve Bank applicable to membership of the payment system management body or authorisation to act as systems operator or PCH system operator;⁴⁸ and to recommend for the approval of the Reserve Bank, criteria in accordance with which a member that is also a Reserve Bank settlement system participant may be authorised to allow other banking institutions to clear or to clear on behalf of a banking institution that is not a Reserve Bank settlement system participant (on condition that the member settles payment obligations on behalf of such institution).⁴⁹ The NPSA deals with “settlement”, that is, the “discharge of settlement obligations”.⁵⁰ Settlement is effected in money or by means of entries passed through the Reserve Bank settlement system or a designated settlement system.⁵¹ The discharge of the settlement and payment obligations between system participants is settled by means of “settlement instructions” given by either the system participant or the payment clearing house. Settlement obligations, as we have said, are discharged in money or by means of entries passed through the “settlement system”.⁵² Of importance are sections 5 and 8. Section 5 provides:

- “(1) Settlement is effected in money or by means of entries passed through the Reserve Bank settlement system or a designated settlement system.
- (2) A settlement that has been effected in money or by means of an entry to the credit of the account maintained by a settlement system participant in the Reserve Bank settlement system or a designated settlement system is final and irrevocable and may not be reversed or set aside.
- (3) An entry to or payment out of the account of a designated settlement system participant to settle a payment or settlement obligation in a designated settlement system is final and irrevocable and may not be reversed or set aside.”

5 SETTLEMENT AGREEMENTS

In the same manner, clause 15.3 of the *Settlement agreement* for the settlement of payment obligations in the South African national payment system provides that

“when the SARB (as Central Bank) has passed the entries across the settlement accounts (including sub-sets of the settlement accounts such as the continuous processing line) of the relevant parties to effect settlement between the parties in terms of a settlement instruction, the parties will have discharged their payment obligations in respect of which that settlement instruction was given. Such settlement is final and irrevocable”.

The NPSA and the *Settlement agreements* are concerned with the settlement of “payment obligations” owed by one system participant to another. They do not deal with the discharge of the underlying instruments such as cheques, electronic

45 S 4(1)(c).

46 S 4(2)(a).

47 S 4(2)(b).

48 S 4(2)(c).

49 S 4(2)(d).

50 S 5(1).

51 *Ibid.*

52 *Ibid.*

transfer instructions et cetera or the underlying obligation for which they were given or made. Nor do they concern the time when payment of these instruments is effected. These agreements apply only to relations between their parties and do not create entitlements for third parties.⁵³

Section 8 provides:

- “(1) The provisions of this section apply despite anything to the contrary in the law relating to insolvency or in the Companies Act, the Banks Act, the Co-operative Banks Act, the Postal Services Act, 1998 . . . or the Mutual Banks Act.
- (2) If a curator or similar official is appointed to a clearing system participant or a settlement system participant, the curator or similar official is bound by any –
- (a) provision contained in the settlement system rules or in clearing, netting and settlement agreements to which that clearing system participant or settlement system participant is a party, or any rules and practices applicable to the clearing system participant or settlement system participant in relation to such agreements; and
- (b) payment or settlement that is final and irrevocable in terms of section 5(2) or (3).
- (3) A curator or similar official appointed to a clearing system participant or settlement system participant may give written notice to the Reserve Bank to withdraw such participant’s participation in the clearing system or the Reserve Bank settlement system, in which event such clearing system participant or settlement system participant shall no longer be entitled to clear or participate in the Reserve Bank settlement system, other than for purposes of discharging payment or settlement obligations in accordance with the settlement system rules or clearing, netting and settlement agreements to which that clearing system participant or settlement system participant is a party, or any rules and practices applicable to the clearing system participant or settlement system participant in relation to such agreements.
- (4) When an application for the winding-up of a clearing system participant or Reserve Bank settlement system participant is made, a copy of –
- (a) the application for winding-up, when it is presented to the court; and
- (b) any subsequent winding-up order, when it is granted, must be lodged with the Reserve Bank as soon as practicable.
- (5) When a copy of an application for winding-up or subsequent winding-up order is lodged with the Reserve Bank in terms of subsection (4) and the Reserve Bank settlement system participant in respect of whom the copy is lodged is a designated settlement system participant, the Reserve Bank must as soon as practicable after having received the copy, notify the designated settlement system operator.

53 See *BMP Global Distribution Inc v Bank of Nova Scotia* 2009 SCC 15 [2009] 1 SCR 504 para 56. In *National Bank of Greece (Canada) v Bank of Montreal* [2001] 2 FC 288 (CA) para 19 it was said: “This system operates only at the level of banking and similar institutions, and . . . decisions of the compliance panel have no impact on either the private law rights and duties of banks, their customers, and the payers and payees of cheques, or the remedies available to enforce them” cited in *BMP Global* para 57. Cf the discussion by Ogilvie “Forged cheques, mistake of fact and tracing” 2010 *Banking and Finance LR* 545 554–545. These views were echoed in *Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd* 2004 1 SA 284 (SCA) 290DF and *Standard Bank of South Africa Ltd v Peens* 2005 1 SA 315 (SCA) 321EG and cf Johnson and Steigerwald “The central bank’s role in the payment system: Legal and policy aspects” in IMF *Current developments in monetary and financial law* (2008) 445.

- (6) If a clearing system participant or settlement system participant is wound up, the liquidator or similar official is bound by –
 - (a) any provision contained in the rules of the settlement system or in clearing, netting and settlement agreements to which that clearing system participant or settlement system participant is a party, or any rules and practices applicable to the clearing system participant or settlement system participant in relation to such agreements; and
 - (b) any payment or settlement that is final and irrevocable in terms of section 5(2) or (3).
- (7) A clearing system participant or settlement system participant in respect of whom a copy of a winding-up order has been lodged with the Reserve Bank in terms of subsection (4) must no longer be entitled to clear or participate in any settlement system, other than for purposes of discharging payment or settlement obligations in accordance with the rules of the settlement system or clearing, netting and settlement agreements to which that clearing system participant or settlement system participant is a party, or any rules and practices applicable to the clearing system participant or the settlement system participant in relation to such agreements.
- (8) Notwithstanding any written law or rule of law, a court shall not recognise or give effect to –
 - (a) an order of a court exercising jurisdiction under the law of insolvency in a place outside the Republic of South Africa; or
 - (b) an act of a person appointed in a place outside the Republic of South Africa to perform a function under the law of insolvency there, in so far as the making of the order or doing of the act would be prohibited under this Act for a court in the Republic of South Africa or a curator or similar official or liquidator or similar official.”

These provisions were inspired by their Canadian⁵⁴ and Belgian⁵⁵ counterparts and should be compared to sections 35A and 35B of the Insolvency Act.⁵⁶ The

⁵⁴ S 8 of the Payment Clearing and Settlement Act, 1996 (as at 2 August 2010) provides: “(1) Notwithstanding anything in any statute or other law of Canada or a province, (a) the settlement rules of a designated clearing and settlement system are valid and are binding on the clearing house, the participants, a central counter-party and the bank and any action may be taken or payment made in accordance with the settlement rules; (b) the obligations of a participant, a clearing house or a central counter-party to make payment to a participant and the right of a participant, a clearing house or a central counter-party shall be netted and a net settlement or close-out amount shall be determined in accordance with the settlement rules, if they so provide; and (c) where the settlement rules of a designated clearing and settlement system provide that the settlement of a payment obligation through an entry to or a payment out of an account of a participant, a clearing house or a central counter-party at the Bank is final and irrevocable, the entry or payment shall not be required to be reversed, repaid or set aside. (2) An entry to or a payment out of the account of a participant, a clearing house or a central counter-party at the Bank to settle a payment obligation in a designated clearing and settlement system shall not be the subject of any provision or order that operates as a stay of that activity. (3) The rights and remedies of a participant, a clearing house, a central counter-party or the Bank in respect of collateral pledged to it as security for a payment or the performance of an obligation incurred in a designated clearing and settlement system shall not be the object of any stay provision or order affecting the ability of creditors to exercise rights and remedies with respect to the collateral. (4) Notwithstanding that all or part of the administration or operation of a designated clearing and settlement system is conducted outside Canada or that its settlement rules are governed by the rules of a foreign jurisdiction, where in any judicial proceedings in Canada a court determines that the rights and obligations of a person arising out of or in connection with the operation of the designated clearing and settlement system

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issues raised by these provisions concern not only payment within the banking sector but matters concerning set-off, “netting” and insolvency. “Netting” in terms of the NPSA is “the determination of the net payment obligations between two or more clearing system participants within a payment clearing house or the determination of the net settlement obligations between two or more settlement system participants within a settlement system”.⁵⁷

6 NETTING

In markets for foreign exchange, swaps, options and futures, the ability of participants to set-off reciprocal obligations with their counterparties is of fundamental importance for the integrity of the financial system. By netting liabilities paper flow is reduced and the delivery risk minimised. On the default of a market participant, losses will be reduced if the defaulter’s open positions (unexecuted contracts) can be cancelled and losses and gains set-off so as to produce a net balance. If this netting is ineffective the other party will be left with a gross exposure with the consequent risk of domino insolvencies of other participants and banks extending credit to them. This could happen if the liquidator of the defaulter elects to and is able to “cherry-pick” by insisting on performance of the profitable contracts and disclaiming performance on the unprofitable ones. Whether or not the exposure of a participant is net or gross also affects margin

are governed in whole or in part by Canadian law, the provisions of this section shall be applied to the extent that the Canadian law applies in determining those rights and obligations. (5) In this section, ‘settlement rules’ means the rules, however established, that provide the basis on which payment obligations are calculated, netted or settled and includes rules for the taking of action in the event that a participant is unable to meet its obligations to the clearing house, a central counter-party or the other participants.”

55 A 157 of the Belgian Law on the Legal Status and Supervision of Credit Institutions provides: “§ 1. Agreements on bilateral or multilateral netting and explicit close-out agreements intended to enable netting between credit institutions or between credit institutions and establishments in charge of the clearing or settlement of payments or financial transactions may, in the event of the bankruptcy or other circumstances whereby creditors are ranked *pari passu*, be enforceable against creditors, provided that the receivable and payable to be netted were part of the same estate at the time of bankruptcy or of *pari passu* ranking, irrespective of their maturity, their substance or their currency in which they are denominated. If the agreements referred to in the first para were concluded after the date on which payments were suspended as determined by the Court, or within ten days prior to that date, they may not be enforceable against the creditors if they relate to debts previously contracted but not yet due. For the purpose of this para, the National Bank of Belgium and the ‘Institut de Reéscompte et de Garantie/Herdiskontering- en Waarborg-instituut’ are treated in the same way as the credit institutions. § 2. Without prejudice to the provisions of § 1 and of Articles 445 to 449 of the Commercial Code, the payments, transactions and acts carried out by and payments made to a credit institution on the day it was adjudicated bankrupt are valid if they predate the adjudication order or if they were carried out without knowledge of the credit institution’s failure. For the purpose of this para, the establishments in charge of the clearing or settlement between credit institutions of payments or financial transactions shall be treated in the same way as credit institutions. § 3. The King may, for the transactions and payments which He determines, extend the application of this Article to other categories of financial institution.”

56 24 of 1936.

57 S 1 of the NPSA. See, for a more comprehensive discussion, Lawack “The South African banking system” in Sharrock (managing ed) *The law of banking and payment in South Africa* (2016) 63 81ff.

and variation deposits payable by him. In addition, capital adequacy requirements depend on whether the exposure is net or gross.

At common law, a contract is not automatically terminated by the sequestration of the estate of one of the parties. The trustee of the insolvent cannot be compelled to perform specifically since he has to act in the interests of the general body of creditors.⁵⁸ Although this rule is said to reflect a right of election by the trustee, the right of the creditor to demand specific performance is really terminated. Once the trustee decides to abide by a contract he is bound by his decision and must perform all the obligations of the insolvent in terms of that contract.⁵⁹ He is not entitled to demand performance from the other party without tendering performance himself. It follows that the trustee is not bound to perform unexecuted or uncompleted contracts unless he, on the authority of the general body of creditors decides to abide by the contract, it being in the interests of the general body of creditors to do so.⁶⁰ The creditor has an election to accept or reject a repudiation by the trustee since the trustee is not empowered to terminate the contract unilaterally: he can only refuse to perform specifically.⁶¹ If the creditor accepts the repudiation he may treat the contract as being terminated and prove a concurrent claim based on breach of contract. If he rejects the repudiation he cannot demand specific performance but must be satisfied with a concurrent claim for a money substitute, tendering his own performance.⁶²

The Insolvency Act deals with the effect of insolvency in the case of a few contracts only: uncompleted contracts for the acquisition of immovable property;⁶³ instalment sale transactions;⁶⁴ leases⁶⁵ and contracts of service.⁶⁶ In all other cases, the common law rule applies. Section 35 of the Insolvency Act provides for an important exception relating to transactions on an exchange. Moreover, a settlement pursuant to the provisions of the NPSA is “final and irrevocable and may not be reversed or set aside”.⁶⁷ In addition, a curator⁶⁸ or liquidator⁶⁹ to a clearing system participant or settlement system participant is bound by any

- “(a) provision contained in the settlement system rules or in clearing, netting and settlement agreements to which that clearing system participant or settlement system participant is a party, or any rules and practices applicable to the clearing system participant or settlement system participant in relation to such agreements; and
- (b) payment or settlement is final and irrevocable in terms of section 5(2) or (3)”.

58 *Bryant & Flanagan (Pty) Ltd v Muller* 1978 2 SA 807 (A) 812.

59 *Idem* 812–813; *Cohen v Verwoerdburg Town Council* 1983 1 SA 334 (A) 353.

60 *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W) 470.

61 *Porteous v Strydom* 1984 2 SA 489 (D).

62 *Bertelsmann et al Mars The law of insolvency in South Africa* (2008) 222ff.

63 S 35.

64 S 36.

65 S 37.

66 S 38.

67 S 5(2) and (3).

68 S 8(2).

69 S 8(3).

7 CONCLUDING REMARKS

These provisions of the National Payment System Act ensure the stability and integrity of the South African financial system industry. They should not be trifled with nor become the subject of political manoeuvring. They are indeed essential for the financial well-being of the country.